SUPREME COURT, U.S.
FILED
APR 18 1991
OFFICE OF THE CLERK

(7)

No. 90-1059

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, GENNARO FISCHETTI, GEORGE L. GROBE, JR., DIANE MCGRATH, and ANGELO PETROMELIS,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

MARK C. MORRIL
SIMON &. SCHUSTER, INC.
1230 Avenue of the Americas
New York, New York 10020
(212) 698-7138

RONALD S. RAUCHBERG
Counsel of Record
CHARLES S. SIMS
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioner

QUESTION PRESENTED

May New York, by its "Son of Sam law," prohibit publishers from paying advances and royalties for the authorship of books about crimes, to persons accused or convicted of those crimes or who admit those crimes in their books, and require instead that such payments be made to the New York Crime Victims Board to compensate victims of the crimes, when the law (a) prohibits payment only for speech of certain specified content, leaving speech having other content outside its scope, (b) makes provision to compensate crime victims only from payments for speech, leaving crime victims to their ordinary remedies to reach all other assets of criminal tortfeasors, and (c) has in fact deterred the creation and publication of speech?

RULE 29.1 NOTICE

The notice required by Rule 29.1 is set forth in the Petition for Certiorari at 1 n.1.

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OPINIONS BELOW

The opinion of the Court of Appeals (1a-26a) is reported at 916 F.2d 777 (2d Cir. 1990).[1] The decision of the District Court (27a-45a) is reported at 724 F. Supp. 170 (S.D.N.Y. 1989). The

1 "__a" refers to the Appendix to the Petition for Certiorari. "JA __" refers to the Joint Appendix. "CA App. __" refers to the Appendix filed in the Second Circuit, which contained the entire pertinent Record.

decision of the New York Crime Victims Board (49a-53a) is unreported.

JURISDICTION

The judgment of the Court of Appeals (54a) was entered on October 3, 1990. The petition for certiorari was timely filed on December 28, 1990, and the writ was granted on February 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First Amendment provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . . "

New York Executive Law Section 632-a (McKinney 1982 and Supp. 1990), commonly known as the Son of Sam law, is reproduced in the Appendix to the Petition for Certiorari at 55a-58a.

STATEMENT OF THE CASE

This case arises out of Simon & Schuster's publication of the best-selling book *Wiseguy: Life In A Mafia Family*, by Nicholas Pileggi. Widely acclaimed as a skilled, revealing, and debunking book on organized crime with more than a million copies in print (JA 20), *Wiseguy* was subsequently made into an equally acclaimed film by Martin Scorsese, *GoodFellas*. The New York Crime Victims Board ("the Board") determined that New York Executive Law Section 632-a prohibited Simon & Schuster from making payments to the principal source for the information in *Wiseguy*, Henry Hill. Absent those payments, the record shows without

contradiction, the book would never have been written. The Court of Appeals, in an opinion by Judge Miner joined in by Judge Walker, held that section 632-a burdens freedom of speech sufficiently to require strict scrutiny under the First Amendment, but nonetheless upheld the constitutionality of the statute. Judge Newman dissented.

1. New York Executive Law Section 632-a targets only monies paid or earned in the exercise of the rights of free speech and free press. It applies to every contract made with a person "accused" or "convicted" of a crime for the "expression" of the "accused or convicted person's thoughts, feelings, opinions, or emotions regarding such crime" or for the "reenactment" of the crime "by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind. . . ." Section 632-a (1). The law prohibits payment to the accused or convicted person for such expression for at least five years. Section 632-a (4).

The law requires that a publisher[2] who enters into such a contract must provide a copy of the contract to the Board and pay over to the Board any royalties or other payments due under it. The Board places such monies in an escrow fund and is obliged to hold them for at least five years, and then to pay them to any victim who has commenced an ordinary civil tort action and recovered a judgment. The law thus functions as a special attachment statute limited to payments for speech about crime. To the extent that escrowed funds remain after satisfying any judgments obtained by crime victims, they are used to satisfy state

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2 For convenience, we will refer here and below to "publishers," "authors," and "books," and the references should be understood as shorthand for all the First Amendment speakers and works to which section 632-a applies.

and local tax authorities and the others benefitted by the statute specified in section 632-a (11)(b) and (d), and any unused funds are then paid over to the accused or convicted person who earned them. Section 632-a (4).

The statute is designed to have a broad reach. It applies to books dealing principally with other subjects but that have casual or incidental references to their authors' crimes.[3] Its definition of "convicted" persons includes those (like Henry Hill here) who are deemed by the Board to have "voluntarily and intelligently admitted," *in their books*, "the commission of a crime for which such person is not prosecuted." Section 632-a (10)(b).[4] The statute applies to all crimes, not only crimes of violence or felonies. It encompasses federal as well as state crimes,[5] and applies retroactively to crimes committed before its enactment.[6] It benefits even those victims against whom the statute of limitations has run, providing for a revival of claims whenever a criminal writes a book mentioning his or her crime, thus earning a royalty. Section

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3 *See Children of Bedford, Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd without op.*, 556 N.Y.S.2d. 483 (1st Dep't 1990), *appeal pending* (Ct. of Appeals).

4 References below to "accused" or "convicted" persons, or to "criminals," should therefore be understood to include those never formally accused or convicted but who write about their "crimes" in books.

5 *St. Martin's Press v. Zweibel*, No. 12273/89, N.Y.L.J., at 25, col. 1 (Sup. Ct. N.Y. Co. Feb. 26, 1990) (application to Foster Winans for federal securities fraud).

6 *St. Martin's Press v. Zweibel, supra; In re Johnsen (Berkowitz)*, 430 N.Y.S.2d 904 (Sup. Ct. Kings Co. 1979).

632-a (7). The Board applies the statute even where it cannot identify or foresee the existence of any victim of the crime.[7]

"[C]onceived in haste, written in haste, and declared under the cry of the public for the Legislature to exact retribution," *In re Johnsen (Berkowitz)*, 430 N.Y.S.2d 904, 906 (Sup. Ct. Kings Co. 1979), section 632-a was enacted a week after its introduction in the state legislature, amid reports (never confirmed) that members of the media were offering to pay the as-yet unidentified and unapprehended "Son of Sam" killer for the exclusive rights to his story. The sponsor of the bill found it "abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam] . . . can expect to receive large sums of money *for his story*." JA 102 (statement of State Senator Emmanuel Gold, emphasis added).

Four aspects of Section 632-a are particularly noteworthy.

First, the law reaches only payments for expression. Section 632-a (1). Persons accused or convicted of crimes may be paid for non-expressive activities. They may receive and retain gifts, inheritances and income, earned or unearned, from any source. Crime victims are left to their ordinary remedies regarding such assets.

Second, the law prohibits payment only for expression of specified content on a specified subject: "thoughts, feelings, opinions, or emotions" concerning a crime or a "reenactment" of a crime which the accused or convicted person is said to have committed. *Id.* Payments for any other speech — for example, payments to convicted killer Jean Harris for a work about prison

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7 *See In re Bernhard Goetz*, slip op. at 5, 6 (New York State Crime Victims Board, Mar. 17, 1988) (whether law applies "must be determined . . . without consideration of whether any victim exists"). (A copy of this decision has been lodged with the Clerk.)

conditions, or to Henry Hill for a work about his experience in the witness protection program, would not be prohibited. Similarly, while the sales of a novel by John Ehrlichman would likely be enhanced by his Watergate-earned notoriety, the statute would not apply to any royalties he thereby earns.

Third, the funds attached by the statute are made available not just to crime victims, but to all other judgment creditors and others as well (section 632-a (11)) — a preference that none of the state's asserted interests begins to explain.

Last, the extension or revival of the statute of limitations, section 632-a (7), ensures that the speech-inhibiting effects of the statute will endure throughout the lifetime of any criminal who would write about his or her experiences.

The statutory scheme raises the question whether New York's motivation to enact the statute in fact related to victims' compensation, or instead was grounded in hostility to the speech that falls within the statute's defined scope. Further evidence of such hostility, including New York's repeated assertions that the speech to which the statute applies is itself "injurious" to crime victims and exploitative of them, is discussed below.

2. Richard E. Snyder, Simon & Schuster's President and Publisher, and Michael Korda, its editor-in-chief, conceived the idea of publishing a book about Henry Hill, an organized crime foot-soldier cooperating with federal and state prosecutors under the Federal Witness Protection Program. They envisioned that the book would show what working for the mob actually entailed, and would shatter the romanticized picture in books like *The Godfather*. They asked Nicholas Pileggi, an experienced journalist who had previously written articles on organized crime for *The New York Times Magazine*, *New York Magazine*, and *Reader's Digest*, to write the book. Pileggi agreed after consulting with law

enforcement authorities about Hill's reliability and his capability of cooperating to the extent necessary. 6-7a, 28a; JA 18-19, 25-26.

Hill was willing to cooperate only if he were compensated for the hundreds of hours Pileggi would require him to devote to the project. As the majority below noted, "[t]here seems to be no question that Hill would not have agreed to participate in the project without the assurance he would be paid." 6a. Compensating such primary sources is standard publishing industry practice (JA 14, 20, 26-27), and so Simon & Schuster's agreement to acquire and publish *Wiseguy* was made with both Pileggi and Hill and provided for payments to both. There was no dispute in the record, and the Court of Appeals noted, that the book could not and would not have been written without Hill's paid cooperation. 6a, 26a; JA 19, 26.

In accordance with standard industry practice, Hill was paid an advance against royalties when he signed the publishing agreement, and would earn additional royalties based on sales as soon as the advance was recouped. In return, Pileggi received Hill's cooperation on a virtually daily basis for more than two years. Pileggi's notes of hundreds of hours of conversations with Hill — the activities for which Hill was paid — occupy more than six linear feet of files, and form the raw material on which *Wiseguy* (and later *GoodFellas*) was based. 6a; JA 27.

Wiseguy was widely praised as an important contribution to the literature of criminal behavior, and was favorably reviewed by George Will, Jonathan Yardley, *The New Republic*, and the *Kansas City Star*, among many others. JA 19-20, CA App. 172-82. Typical of the response accorded *Wiseguy* was a review by Professor G. Robert Blakey of Notre Dame Law School, principal draftsman of the RICO statute, who wrote that

> Pileggi, fortunately, had the cooperation of Hill and his wife, Karen, so his story reflects a substantial amount of insight into the personalities of the protagonist . . . . *Wiseguy* is . . . a welcome addition to the popular literature on organized crime, and, fortunately, it does not unnecessarily contribute to the sensationalism, glamorizing or romanticizing of organized crime or the mob.

N.Y.L.J., Apr. 15, 1988, at 2, col. 3. Jimmy Breslin, a newspaper columnist in New York City, called *Wiseguy* "the best book on crime in America ever written." JA 19, CA App. 173.[8]

3. The Board commenced its inquiry by delivery of letters to Simon & Schuster and author Pileggi which sought, *inter alia*, copies of "all . . . contracts or agreements" either Simon & Schuster or Pileggi may have entered into with any person "who has been accused or convicted of a crime," the name of any such person, a "description, location, and dates of crimes committed," and any amounts paid to such person. JA 86-89. These sweeping demands required Simon & Schuster to review all of its thousands of contracts, and sought to conscript Simon & Schuster into laying bare any information it might have on the past criminal activity of

8 The Court can take judicial notice of the fact that *GoodFellas*, based on *Wiseguy* (and therefore dependent on the payments at issue here), was itself highly acclaimed. Among its many other awards, *GoodFellas* was chosen best film of 1990 by the Los Angeles Film Critics Association, the New York Film Critics Circle, the National Society of Film Critics, the National Film Board of Review, the Chicago Film Critics, the American Film Magazine Poll, and the British Academy of Film and Television, and was nominated as best film by the Academy of Motion Picture Arts and Sciences.

any of its authors or primary sources, and were not limited to *Wiseguy*. *Id.*

After administrative proceedings, the Board found in May 1987 that Simon & Schuster had violated section 632-a by failing to turn over to the Board the publishing agreement for *Wiseguy* when it was signed in September 1981, and by paying Hill $96,250 as his share of the advance. JA 52-53.[9] The Board ordered Simon & Schuster to turn over to it any additional royalties payable to Hill, and a penalty equal to the $96,250 previously paid Hill unless Hill promptly paid that sum to the Board. JA 53-54.

The Board based its administrative determination squarely on *Wiseguy*'s content. Hill was deemed subject to the statute because *Wiseguy* "contains . . . his admission to involvement in . . . crimes" (JA 53), and *Wiseguy* was deemed subject to the statute because it contains Hill's "thoughts, feelings, opinions and emotions regarding [those] crime[s]." *Id.*[10]

4. In August 1987, Simon & Schuster brought this action under 42 U.S.C. § 1983 against the members of the Board, seeking declaratory and injunctive relief invalidating the Son of Sam law on its face and as applied to the payments due Hill for helping to create *Wiseguy*.

9 The document initially labelled "Proposed Determination and Order" subsequently became the Board's final Order by its terms. JA 49; *see* JA 15.

10 Henry Hill was never prosecuted for the principal events written about in *Wiseguy* because he was immunized by state and federal prosecutors and was cooperating with them under the Federal Witness Protection Program. 6-7a; JA 18, 25.

Simon & Schuster moved for summary judgment, relying on affidavits from authors, publishers, editors, and a leading literary agent establishing that the statute's prohibition on payments for certain speech had and would continue to have "the inevitable effect of reducing the total quantum of speech." *Meyer v. Grant*, 486 U.S. 414, 423 (1988). *See* JA 18-47.

Michael Korda, Simon & Schuster's editor-in-chief, and Sterling Lord, a leading literary agent who represented Pileggi and Hill, explained the vital and indispensable role that pre-publication advances have in publishing. JA 20-22, 31-33. As Korda noted (JA 20),

> By forbidding payment to certain writers and sources, the statute necessarily results in some books not being published. In all my years in publishing, I have never seen an author, and rarely a primary source (one who will have to spend substantial time providing information to an author), who would be willing to undertake the necessary tasks without an enforceable promise that he will be paid, and paid promptly. Most authors and primary sources do not have the financial resources to write without promise of recompense; the hours they spend writing rather than at other work are hours for which they need to be remunerated. Yet the statute precludes us from promising to compensate certain authors or sources at all, and prohibits us from paying them advances or royalties on the standard timely basis — making it as a practical matter impossible to conclude an agreement with an author or source.

Pileggi and Korda both explained that timely paying Hill was essential to the creation of *Wiseguy*. JA 19, 26.

The affidavits showed how the law's prohibition against paying primary sources and authors has a significant impact on what is and is not written and published. Pileggi has foregone at least three specific book projects that he would have pursued but for his concern over Son of Sam law interference. JA 27-28. Simon & Schuster too has in fact rejected certain book projects because the law would apply. JA 21. G.P. Putnam's Sons has edited out a discussion of a youthful crime from an autobiography of a celebrity author, in order to avoid the snare of a Son of Sam law. JA 47. Literary agent Sterling Lord recalled that portions of a manuscript he once sold, a frank autobiographical work about a life of burglary (in 1953), would have had to have been deleted in order to publish the book had the Son of Sam law been in effect. JA 32.

Korda's affidavit also included this example of the dilemmas posed by the Son of Sam law: Simon & Schuster was then (1987) grooming Jesse Jackson's autobiography for publication. Korda's interest in publishing the work arose "not from any past crime to be exploited for profit, but from the intrinsic interest of the larger life-story the author (here, a candidate for President of the United States) has to tell." JA 21. The first chapter of Jackson's manuscript, however, tells about Jackson's 1963 arrest in North Carolina for trespassing and resisting arrest while attempting to be served at a Woolworth's lunch counter. JA 22.

Had that "crime" occurred in New York rather than North Carolina, what would Korda and Jackson do? Pay the advances and royalties due Jackson to the New York Crime Victims Board? Or delete the material that would trigger the law, offering the public a somewhat sanitized version of Jackson's history? *Id.*

Other publishers' affidavits cited examples of works that would have been subject to the law, and thus possibly bowdlerized or not published, had the Son of Sam law applied at the time and place of

publication, including works by Martin Luther King, Jr., Malcolm X, Lenny Bruce, Whitaker Chambers, Armand Hammer, and Abbie Hoffman. JA 21-22, 32, 34-35, 43, 45-46, and CA App. 71.

On October 24, 1989, the District Court upheld the law, on cross motions for summary judgment, as an "incidental" limitation on speech. The Court declined to apply strict scrutiny and distinguished *Meyer v. Grant*, 486 U.S. 414 (1988), which held that direct restrictions on payment for speech are equivalent to direct restrictions on speech and are therefore subject to strict scrutiny, as applying only to political speech. 38a.

5. A split panel of the Court of Appeals affirmed the judgment, but not the reasoning, of the District Court. 1a-26a.

The Court unanimously disagreed with the District Court on the proper level of scrutiny, all panel members holding that the statute imposes a direct burden on free expression requiring the application of strict scrutiny. 10-13a, 19a. Three independent reasons were given: the statute's content-based application, its "singl[ing] out the media for differential treatment," and its "effect of excluding from circulation the expression of criminals who would write about their crimes. . . ." 12-13a.

The majority nonetheless upheld the statute, finding it "narrowly tailored to [serve] the State's [compelling] interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." 15a.

Judge Newman dissented on the ground that the Board had not justified the suspect distinctions drawn by the statute (24a-25a):

> [W]hen New York, understandably outraged by the prospect that a criminal might profit from a book about his crime, tries to enact a victim restitution statute that applies only to protected speech, rather than all income-producing activity, and, then, only to speech of specified content, rather than all speech, it encounters First Amendment obstacles that in my judgment are insuperable.

The dissent also found the statute ill-suited to achieve its objective, noting that the five escrow accounts established in the statute's first eleven years (three for the same victim) were "more than offset by the royalties that would have been earned on books that were not published because of this statute." 25a.[11]

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has repeatedly held that payments necessary to make and disseminate speech can no more be restricted than the speech itself. The Court has recently and unanimously reaffirmed that principle. *Meyer v. Grant*, 486 U.S. 414, 423 (1988).

Simon & Schuster saw Henry Hill's willingness to cooperate with federal prosecutors as the opportunity to create a book that would help reveal the true nature of organized crime. Simon & Schuster had to pay advances and royalties to Hill in order make its point. Like the speech in *Wiseguy* itself, the right to make the payments essential to *Wiseguy*'s creation is constitutionally protected.

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11 From the enactment of the statute in 1977 to October 1988, the Board had actually paid escrowed funds to the victims of precisely one criminal. JA 137-38. According to a recent *New York Times* article for which Board member Petromelis was interviewed, no additional victims have been assisted since that time. *The New York Times*, Feb. 20, 1991, at B8. According to the article, Board member Petromelis characterized the funds produced by section 632-a as "small-time stuff," and noted that by contrast the Board has distributed to crime victims more than $12 million obtained under auspices other than section 632-a.

As this Court held in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978), "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." By prohibiting publishers contracting with writers or sources who have been accused or convicted of crimes, or who may "admit" crimes in their proposed books, from paying timely compensation with respect to any expression concerning such crimes, section 632-a, in the words of the majority below, has "the effect of excluding from circulation the expression of criminals who would write about their crimes" if the agreed-upon payment could be made. 12a. This "exclusion" of speech is intolerable under the speech and press clauses of the First Amendment.

1. The restriction on timely contractual payments of advances and royalties on which the creation and publication of books generally depends is presumptively violative of the First Amendment, and subject to exacting scrutiny, for three independent reasons.

First, as common sense, the record below, and the Court of Appeals' findings confirm, the payment restrictions directly burden speech by deterring the creation of speech subject to its terms, and are therefore subject to strict scrutiny under *Meyer, supra*, and *Buckley v. Valeo*, 424 U.S. 1, 15-20 (1976) (*per curiam*). Second, strict scrutiny is required because Section 632-a singles out expressive activity and the press. *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983). Third, strict scrutiny is also required because the payment restriction applies only to speech of specified subject matter and content and by specified speakers. *E.g., Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *First Nat'l Bank v. Bellotti, supra*.

2. Section 632-a fails strict scrutiny. The Board has proven neither that the statute as a whole is necessary and narrowly tailored to serve compelling state interests, nor that there is any necessity for its content-based distinctions and its singling out of the press for special adverse treatment.

Section 632-a is grossly underinclusive with respect to the interest in victim compensation, because it aids only those crime victims whose crimes are written about by those who injured them.

Nor can section 632-a be justified by the interest in preventing criminals from profiting from or exploiting their crimes. Payments for *Wiseguy*, and payments generally for books subject to the Son of Sam law (had the law been in effect when they were written) such as, to take just two examples, Martin Luther King, Jr.'s *Where Do We Go From Here?* and *The Autobiography of Malcolm X*, are not under traditional understanding or any sensible definition the profit of crime, and could not be deemed so without depriving the people of speech that the First Amendment fully protects.

Moreover, because section 632-a applies to all of the compensation paid even for works principally devoted to subjects other than crime, the statute is impermissibly overinclusive with respect to the interest in ensuring that criminals not profit from crime. And by providing for the return of any payments to the "criminal" should no victim file a tort action and obtain a judgment within five years, the statute permits some criminals to "profit" and is thus underinclusive as well.

Finally, the statute cannot be justified by the wordplay of mixing the two independently insufficient interests together to create an interest in assuring "that funds are set aside out of profits derived by criminals from the exploitation of their crimes and made available for the payment of judgments later recovered by the victims of the crimes exploited." 15a. This so-called interest rests

at bottom on victim compensation, and fails to justify both the statute's failure to reach all the assets of criminal tortfeasors, rather than just assets from expression, and its suspect singling out of payments for expression on certain subjects. New York has an important interest "that funds [be] set aside" out of all a criminal's assets to be made available to satisfy judgments obtained by victims, but it has no good reason to advance that interest solely as to speech-related assets derived from speech of disfavored content.

ARGUMENT

I

THE DIRECT BURDENS SECTION 632-A IMPOSES ON SPEECH ARE SUBJECT TO STRICT SCRUTINY

Laws that directly burden expression,[12] that regulate on the basis of content or the identity of the speaker,[13] or that single out the media for differential and adverse treatment,[14] so impair free speech interests that they are presumptively invalid. Such laws are subject to "exacting scrutiny," *Meyer*, 486 U.S. at 420, or "strict scrutiny" as it has come to be known, and can be upheld only if the government successfully bears the burden of proving that the law

12 *E.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989); *Meyer v. Grant*, 486 U.S. 414 (1988); *Buckley v. Valeo*, 424 U.S. 1, 64, 66 (1976). *See also Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 707 (1986).

13 *E.g.*, *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

14 *E.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983).

is necessary and narrowly tailored to serve compelling governmental interests that cannot otherwise be achieved.

Section 632-a has not merely one, but three, of the defects that this Court has held trigger strict scrutiny, as the Second Circuit unanimously held:

- the restriction on payment for speech is a direct burden on speech that has the effect of reducing speech by some accused or convicted criminals who otherwise would write about their crimes;
- the restriction on payment applies only to payment for speech (*i.e.*, only to the media), and not to any other payments to or assets held by those subject to the law; and
- the restriction on payment applies only to speech of specified subject matter and content by specified speakers.

Because these aspects of section 632-a trigger strict scrutiny, the Board's contentions that strict scrutiny need not be applied because no speech is restricted at all, citing *Arcara*, 478 U.S. 697, or that only minimal scrutiny is required because any restriction is incidental, citing *United States v. O'Brien*, 391 U.S. 367 (1968), are without merit.

A. Section 632-a's Payment Restriction Directly Burdens Protected Speech and the Press and Has Deterred the Publication of Protected Speech

Statutory restrictions on expenditures for speech have the "inevitable effect of reducing the total quantum of speech." *Meyer*, 486 U.S. at 423. This Court has held seven times in the last fifteen years that restrictions on payments for speech are direct burdens on speech that are invalid unless proven to be necessary and narrowly

tailored to serve compelling governmental interests.[15] Those cases, in each of which the expenditure restriction was struck down, are controlling here, and require subjecting section 632-a to strict scrutiny.

Meyer v. Grant is illustrative. There, this Court unanimously held that a Colorado law that prohibited initiative proponents from paying petition circulators (but left them "free" to engage circulators without payment) constituted a direct burden on the First Amendment rights of the initiative proponents. 486 U.S. at 428. This Court rejected the argument that speech was not burdened because the law prohibited only payment and not the underlying speech. The Court described the burden on speech as "well-nigh" impossible to justify, and struck down the law. *Id.* at 423, 425. *See also Riley v. National Fed'n of the Blind*, 487 U.S. 781, 793-94 (1988) (recognizing that a speaker's uncertainty whether he will be paid "must necessarily chill speech in direct contravention of the First Amendment's dictates.")

Here, as in *Meyer* and *Riley*, the statutory prohibition on making payments deemed necessary for speech will predictably

15 *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988) (payments to charitable solicitors); *Meyer*, 486 U.S. 414 (payments to petition circulators); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (contributions by political advocacy group); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (payments to charitable solicitors); *Village of Schaumburg v. Citizens For A Better Env't*, 444 U.S. 620 (1980) (payments by environmental group to solicitors); *First Nat'l Bank*, 435 U.S. 765 (expenditure supporting initiative); and *Buckley*, 424 U.S. at 15-20 (expenditures for political expression). *See also Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990) (applying strict scrutiny but upholding statute).

eliminate some speech that would otherwise take place, and as shown by the undisputed record has already done so.

No matter how willing, most people cannot devote hundreds of hours to books "without promise of recompense; the hours they spend writing rather than at other work are hours for which they need to be remunerated." JA 20; *see also* JA 21-22, 31-33. As the Second Circuit held, "[w]ithout a financial incentive . . . most would-be storytellers will decline to speak or write." 11a.

"Undisputed affidavits" below established, as Judge Newman noted, that section 632-a's prohibition on payments by publishers to authors and primary sources "has already led to decisions not to publish books of high public interest." 24a. *See* pp. 10-12, *supra*. The record proved without dispute that Son of Sam law restrictions have led to decisions not to write and not to publish certain works, and to self-censor discussion of events which books otherwise would have included, to avoid triggering the law. JA 20-22, 27-28, 32, 34-35, 43, 45-47, and CA App. 71.

That record cannot be dismissed as "conjectural" or "speculative." Plaintiff adduced specific examples of works that have not been published at all and of works that have been bowdlerized, as a result of the payment restrictions of Son of Sam laws,[16] as well as assessments of the law's harmful effect on incentives to write and publish by writers, editors, publishers, and literary agents whose judgments are probative and may not be summarily disregarded. *See, e.g.*, JA 26-28, 30-33, 34-35, 37-41, 42-43, 45-47. This Court has frequently relied on similar evidence

16 JA 21, 28, 47.

in holding that certain regulations will directly burden speech and therefore warrant strict scrutiny.[17]

This record fully supports what experience teaches and what our law confirms, that the incentive of economic gain is the engine that drives free expression. *See, e.g., Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 558 (1985) ("[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas"); *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (promise of personal gain "motivate[s] the creative activity of authors . . ."); *Mazer v. Stein*, 347 U.S. 201, 219 (1954) ("encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors . . . ").[18] As this Court has observed, "[b]eing free to engage in

17 *See, e.g., Meyer*, 486 U.S. at 423 n.6 ("Paul Grant testified that compensation resulted in more people being 'able and willing' to circulate petitions. 2 Record 19-20. As he succinctly concluded: '[M]oney either enables people to forego leaving a job, or enables them to have a job.'"); *National Fed'n of the Blind v. Riley*, 635 F. Supp 256, 260 (E.D.N.C. 1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987), *aff'd, Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988).

18 These cases echo H.L. Mencken's remark that "the impulse to create beauty is rather rare in literary men . . . far ahead of it comes the yearning to make money," Samuel Johnson's dictum that "no man but a blockhead ever wrote except for money," and Thomas Macauley's recognition that "[i]t is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated. . . ." *See* B. Stevenson, *Homebook of Quotations* at 2250 (Greenwich House) (10th ed. 1984), *quoting* Mencken, *Prejudices*, Fifth Series at 189 (A.A. Knopf 1926), and (continued...)

. . . expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline. . . ." *Buckley*, 424 U.S. at 19 n.18; *see also Meyer*, 486 U.S. at 423-24. The defenders of section 632-a must admit that its strictures cannot fail to deter speech.

B. Section 632-a Differentially Regulates Expressive Activity

Section 632-a is also subject to strict scrutiny under the rule that a regulation that "singles out the press" requires "a heavier burden of justification on the State" than does a generally applicable economic regulation, and is invalid unless "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential" regulation. *Minneapolis Star*, 460 U.S. at 585-86. *See also Leathers v. Medlock*, Nos. 90-29, 90-38, 1991 U.S. LEXIS 2220 (April 16, 1991) (Genfed library, U.S. file) (reaffirming *Minneapolis Star*); *Arcara*, 478 U.S. at 704, 706-07 (requiring a "greater burden of justification" where "a statute . . . has the inevitable effect of singling out those engaged in expressive activity"); *Arkansas Writers' Project*, 481 U.S. at 228 (legislation "singling out the press . . . poses a particular danger of abuse by the State").

The rule requiring justification for differential regulation of the press averts troublesome inquiries into legislative motive, and deters legislation stemming from hostility to the press by requiring legislatures to subject other economic actors to the same burdens that are imposed on the press. *See, e.g., Minneapolis Star*, 460

18(...continued)
Boswell, *Life of Samuel Johnson* (1776); Macaulay, *Copyright* (1841 Speech in House of Commons), in 8 Works at 195, 197 (Trevelayan ed. 1879).

U.S. at 585 ("differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression"); *Carlin Comm., Inc. v. FCC*, 749 F.2d 113, 121 (2d Cir. 1984); *cf. Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring).

Because only those who contract to publish or create expression are subject to section 632-a's burdens, the law plainly singles out "those engaged in expressive activity" in precisely the way that *Minneapolis Star* and its progeny condemn, and is therefore subject to strict scrutiny for this reason as well. Section 632-a deprives only those engaged in expressive activity from receiving agreed-on payments for lawful activity, prohibits only the media from making payments for lawful activity, and subjects only the media's contracts to the inspection and regulation of the Board. Indeed, by carefully and exhaustively listing all the expressive media to which the prohibition applies, including every "movie, book, magazine article, tape recording, phonograph recording, radio or television presentation, [and] live entertainment," the legislature has targeted expression and the media as precisely and thoroughly as Maverick missiles recently targeted Iraqi tanks.

C. Section 632-a Is Content-Based

Section 632-a's application depends squarely on the content of the speech contracted for. Payment may be made for all speech *except for* speech that "reenact[s]" the crime or that "express[es] such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime." Section 632-a (1). The statute is therefore subject to strict scrutiny as a content-based regulation of speech, *Texas v. Johnson*, 491 U.S. 397, 412 (1989), as the Second Circuit panel unanimously held.

This Court has repeatedly held that regulations of speech whose application depends on the content or subject matter of the protected speech, or on the identity of the speaker, pose special dangers to free speech that warrant "the most exacting scrutiny." *See, e.g., Leathers v. Medlock, supra* (a "content-based regulation . . . will distort the market for ideas"); *United States v. Eichman*, 110 S. Ct. 2404, 2409 (1990); *Texas v. Johnson*, 491 U.S. at 406 (the government "may not . . . proscribe particular conduct *because* it has expressive elements") (emphasis in original); *Arkansas Writers' Project*, 481 U.S. 221; *First Nat'l Bank*, 435 U.S at 784-85 ("the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the persons who may address a public issue").[19]

Content-based distinctions need not be lodged in flat prohibitions to trigger strict scrutiny; strict scrutiny applies to content-based measures even where the underlying measures are time, place or manner regulations or otherwise do not themselves pose substantial burdens on speech. *E.g., Arkansas Writers' Project*, 481 U.S. at 227 (strict scrutiny applicable to subject-matter based sales tax regardless of size of tax burden); *Erznoznik v. City*

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19 *See also FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (among the "purest examples of a 'law . . . abridging the freedom of speech, or of the press' . . . [is a] regulation that denies one group of persons the right to address a selected audience . . . "); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984); *Carey v. Brown*, 447 U.S. 455, 461-64 (1980); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972); and *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 26 (1989) (White, J., concurring).

of Jacksonville, 422 U.S. 205, 215 (1975) ("even a traffic regulation cannot discriminate on the basis of content . . .").[20]

The Board's suggestion below that strict scrutiny is not required here because the statute is "justified without reference to the content of the regulated speech" under the holding of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), is insupportable, both because the state has repeatedly justified section 632-a by its content, and because *Renton* has no application to measures that regulate speech directly, rather than only incidentally.

The Board has repeatedly justified the statute as necessary because "*depiction of the crime in the media often causes additional suffering* to victims and their families."[21] The Board called the statute necessary because "reenactment of the crime in the press by itself *causes a second harm* to the victim," and referred in the district court to "crime victims and their families *who suffer a second violation when a criminal sells the story of his crime to the media*."[22] The law's chief sponsor underlined the concern with content: "[i]t is abhorrent to one's sense of justice and decency that an individual, such as [Son of Sam], can expect to receive large sums of money *for his story*." JA 102. (Emphasis supplied.)

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20 *See also Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1, 20 (1986); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (citing cases); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 295 (1984).

21 Respondents' Brief in Opposition to the Petition for Certiorari ("Br. in Opp.") at 14 (emphasis added).

22 Board Reply Mem. in Support of Cross-Motion for Summary Judgment at 30-31, 34 (emphasis added).

These justifications for the statute, in addition to manifesting hostility to the speech that is subject to the statute, show that the law cannot be considered content-neutral. The "justifications for regulation [must] have nothing to do with content" — which is plainly not the case here — for a statute to be understood as content-neutral. *Boos v. Barry*, 485 U.S. 312, 320 (1988).

The statute is therefore squarely subject to strict scrutiny. "The emotive impact of speech on its audience is not a 'secondary effect' unrelated to the content of the expression itself." *Texas v. Johnson*, 491 U.S. at 412 (citation omitted).

Not only does the Board seek to justify the Son of Sam law by reference to the content of the speech for which payment is prohibited, but *Renton* is inapplicable in any event. That decision, which has never been determinative in this Court in any subsequent case, addressed a zoning regulation governing the location of businesses purveying sexually oriented materials. The ordinance in *Renton*, although seemingly content-based, addressed only the secondary effects of speech and applied regardless of whether each particular film shown by regulated theaters had any specified content or subject matter.

Renton has never been applied to a measure that restricts speech on its face, which is what payment restrictions do under *Buckley* and *Meyer*, much less to a differential regulation of speech subject to *Minneapolis Star*. Thus, even accepting the Board's argument that section 632-a is, under *Renton*, not sufficiently "content-based" to draw strict scrutiny on that account, the statute would still be subject to strict scrutiny for the reasons set forth above in Points IA and IB *supra*.

D. *United States v. O'Brien* Is Inapplicable Because Section 632-a Is Not An Incidental Restriction on Speech

The demonstration above that section 632-a is subject to strict scrutiny because it burdens speech, is content-based, and singles out the media and those who engage in expression, necessarily forecloses application of the relaxed standard of *United States v. O'Brien*, 391 U.S. 367 (1965), as the Court of Appeals unanimously held. 10a-13a. Direct consideration of *O'Brien* also shows the Board's invocation of that standard is unavailing.

First, *O'Brien* applies only where a statute is aimed at a broad range of behavior and its application to speech is truly incidental. *O'Brien* is inapposite where a statute necessarily regulates speech "on its face." 391 U.S. at 375 (statute prohibiting draft card destruction regulates conduct like "a motor vehicle law prohibiting the destruction of drivers' licenses"); *see also Arcara*, 478 U.S. at 702, 707 (noting that *O'Brien* first inquired whether statute regulated expression on its face or conduct that was "necessarily expressive," and that *Minneapolis Star*, not *O'Brien*, applies to a statute that "has the inevitable effect of singling out those engaged in expressive activity").

Section 632-a's impact on speech is the opposite of incidental. Its intended and indeed *only* function is to prohibit certain payments for expression, and it applies to expression not sometimes but in *every* application. Payment for speech is not "conduct" within the meaning of *O'Brien*, and is not, to use *O'Brien*'s formulation, "within the constitutional power of the Government" to regulate. This Court has already rejected precisely the argument the Board advances here, holding that restrictions on payment for speech are not "comparable to the restrictions on conduct upheld in *O'Brien*." *Buckley*, 424 U.S. at 16.

O'Brien, moreover, does not apply to measures that regulate based on the content of speech. *E.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984). Section 632-a's impact on the speech it regulates can hardly be said to be incidental when the legislature explicitly chose to regulate only speech of that very content, and none other.

Finally, the interest assertedly underlying the Son of Sam law is related, not unrelated, to the suppression of free speech, because the very purpose of the statute was to reflect the public's "abhorrence" at particular exercises of First Amendment rights. The state's asserted interests in remedying the "additional suffering to victims and their families" often caused by "depiction of the crime in the media" (*see* p. 24 *supra*), and in avoiding the supposed affront to the public's "sense of justice and decency" that these exercises of First Amendment rights pose (*id.*), blossom only when a book communicates some message. *United States v. Eichman*, 110 S. Ct. 2404; *Texas v. Johnson*, 491 U.S. at 410 (citation omitted). "We are thus outside of *O'Brien*'s test altogether." *Id.*

II

THERE IS NO COMPELLING JUSTIFICATION AND NO NECESSITY FOR SUBJECTING ONLY PAYMENTS FOR EXPRESSION, AND ONLY PAYMENTS FOR EXPRESSION ON CERTAIN SUBJECTS, TO THE BURDENS OF SECTION 632-A

A. The Board Must Prove That the Statute and the Distinctions It Draws Are Necessary and Narrowly Tailored to Serve Compelling Interests

The Board must prove both that the burden of section 632-a is necessary to achieve a compelling state objective and that it is

necessary to restrict only speech and only speech of particular content in reaching that objective. *See, e.g., Arkansas Writers' Project., Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (interest in taxation does not justify content-based differential incidence of tax); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583 (1983) (interest in taxation does not justify differential taxation of the press); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (striking down statute permitting labor picketing in residential areas but not non-labor picketing, since "[a]ppellant can point to nothing inherent in the nature of peaceful labor picketing that would make it any less disruptive of residential privacy than peaceful picketing on issues of broader social concern . . . the State's asserted interest in promoting the privacy of the home is not sufficient to save the statute").

In addition, the Board must prove, not merely assert, the requisite necessity. *See Meyer v. Grant*, 486 U.S. 414, 426 (1988) (requiring state to "demonstrate" how challenged law is "necessary" to further interests, and striking statute where "no evidence [was] offered" to support the state's "speculation"); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 (1978) (requiring that state interests be supported by "record or legislative findings").

B. Section 632-A and Its Distinctions Are Not Necessary and Narrowly Tailored to Serve Compelling Interests

No one disputes our society's important interest in providing for the compensation of crime victims, and the following points are common ground:

- New York, like every state and the federal government, properly maintains a structure of tort law, appropriate civil remedies, and restitutionary and forfeiture measures to facilitate the compensation of crime victims out of the assets of those who have injured them;

- *all* of the assets of and payments due such tortfeasors may properly be made available to crime victims to secure satisfaction of claims and judgments;
- legislatures have broad powers to enhance existing generally applicable victim compensation remedies not only upon judgment but earlier as well.[23]

Simon & Schuster claims no First Amendment immunity from the obligation of all persons and businesses to comply with generally applicable post-judgment or pre-judgment remedies, and crime victims have in fact executed against royalties held by publishers and owing to tortfeasors without publisher objection. JA 35-36; *see also* JA 109.[24]

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23 In considering any generally applicable enhancements to existing remedies, the legislature would necessarily have to weigh the interests of all persons and businesses affected. By contrast, in enacting section 632-a, only the interests of criminal authors and the media — neither group having wide popular approval — were directly impaired. *See Minneapolis Star*, 460 U.S. at 585 ("[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency"); *Leathers v. Medlock*, *supra* (same); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-13 (1949) (Jackson, J. concurring).

24 Below, Gerald Hollingsworth of Random House described how New York's general pre- and post-judgment remedies enabled the estate of murder victim Richard Adan to attach and, after judgment, execute against royalty payments due from Random House to author Jack Henry Abbott, author of *In the Belly of the Beast*. JA 35-36. (Because the book did not discuss the crime against Adan, section

(continued...)

The question is therefore not whether payments due criminals for expression may be made available to satisfy crime victims' claims; no one doubts that they may. Instead, the question is whether New York may single out certain speakers and certain expression and specially aid victims' efforts to recover from the proceeds of that expression, while providing no special aid to victims as to the proceeds of other expression or, indeed, as to assets gained in all other ways.

Section 632-a is not necessary to serve any of the interests that have been asserted to support it, and none of these interests explains or justifies section's 632-a's skewed application only to payments for speech of specified content.

1. Section 632-a's Distinctions Are Neither Necessary Nor Narrowly Tailored to Serve the Interest in Victim Compensation

The Board has conceded that "New York's interest is not to compensate the broad class of crime victims; rather, Section 632-a was enacted to benefit a special category of victims, *i.e.*, the victims of those criminals who seek to profit by telling the story of their crime." Br. in Opp. at 15. The concession that the law is too underinclusive to be successfully justified simply as a victim compensation measure was unavoidable, since the interest in victim

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24(...continued)
632-a did not apply.) As Hollingsworth stressed (JA 36),

> We do not contend that crime victims who obtain tort judgments are prohibited by the First Amendment from obtaining satisfaction from the proceeds of expressive activity.

compensation cannot begin to explain the law's restricted application to benefit only those few who are victimized by authors who write about the crimes.

Victim compensation does not explain the prohibition of payment only for speech (and only speech of specified content), while leaving criminals free to obtain unearned payments or payments earned for non-expressive activities. Victim compensation does not explain why New York prohibits Simon & Schuster from paying Henry Hill for *Wiseguy* while it would permit Drexel Burnham Lambert after the conviction of Michael Milken to pay Milken his salary, leaving Milken's victims to their ordinary civil remedies unaided by any special attachment. Nor does it explain the decision to reach only payments for certain expression, while giving no aid to the estate of murder victim Herman Tarnower, for example, should his killer Jean Harris write solely about prison conditions without mentioning her crime. *Children of Bedford, Inc.*, 541 N.Y.S.2d 894 (Sup. Ct. N.Y. Co. 1989), *aff'd without op.*, 556 N.Y.S.2d 483 (1st Dep't 1990), *appeal pending* (Ct. of Appeals).

Similarly, the interest in victim compensation cannot explain why section 632-a would revive an expired claim if a criminal were to earn royalties through writing a book about an old crime, but does not revive a claim if a criminal has an inheritance or in some other way acquires assets that could be paid over to his or her uncompensated victims.

Section 632-a has also not been shown to be even useful, much less necessary, in aiding victims. The Board has conceded that it has been invoked no more than ten times, and has in fact aided victims of only a single criminal since 1977. *See* n.11 *supra*. In addition, loss to victims of income they could have seized from books not written or published, such as the three projects involving criminal primary sources that Nicholas Pileggi has foregone, likely

exceeds any payments attached by the Board, as Judge Newman noted in dissent. 25a. The law on balance probably works against the compensation of crime victims.

The Board, moreover, has expressly held that New York's existing generally applicable measures are adequate for crime victims. In an administrative determination holding section 632-a inapplicable against New York subway gunman Bernhard Goetz, the Board remanded Goetz' injured victim to "procedural safeguards contained in the [Civil Practice Law and Rules] that can be used to insure that any assets of Goetz will be available to satisfy any money judgment obtained against him."[25]

Among those existing provisions that "insure" the availability of the criminal's assets to satisfy money judgments are post-judgment remedies, *see* N.Y. Civil Practice Law & Rules [CPLR] §§ 5000-5252, and pre-judgment remedies, CPLR §§ 6201-6226. New York also provides for financial aid to crime victims, *see* N.Y. Executive Law §§ 630-31; for orders of restitution at sentencing which can be made a condition of probation, N.Y. Penal Law § 60.27 and N.Y. Crim. Proc. Law § 420.10 (1)(c); and for forfeiture of proceeds and instrumentalities of crime, CPLR §§ 1310-1352 and N.Y. Crim. Proc. Law §§ 480.00-480.35.

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25 *In re Bernhard Goetz*, *supra* n.7, slip op. at 8. Although Goetz was convicted of unlawful possession of the firearm which he had concededly used to cripple a youth Goetz claimed was menacing him, the Board found section 632-a inapplicable on the ground that his acquittal of assault and other charges rendered him not "convicted". The Board's decision in *Goetz* had no basis in the statutory text, and indicates that section 632-a's potential for viewpoint discrimination has been realized.

The Board made no attempt here to prove these remedies inadequate for crime victims, and the legislature considered no such evidence and made no such findings during the few days it considered section 632-a. In fact, the record reflects that these remedies have been successfully used in favor of crime victims in cases where the Son of Sam law did not apply. JA 35-36. But more to the point, if they are inadequate, no one has ever offered a coherent reason why they should be enhanced only as to the proceeds of certain speech while left unenhanced as to all other assets held by criminals.

In short, the statute with its various distinctions is substantially underinclusive with respect to victim compensation, and it has not in any event been shown necessary to further that interest. *See*, *e.g.*, *Arkansas Writers' Project*, 481 U.S. at 230; *Minneapolis Star*, 460 U.S. at 583; *Carey*, 447 U.S. at 465; *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 100 (1972).

2. Section 632-a's Distinctions Are Neither Necessary Nor Narrowly Tailored to Prevent Criminals From Profiting From or Exploiting Their Crimes

The state's undoubted interest in preventing criminals from profiting from their crimes is not truly implicated here and cannot save section 632-a. First, and fundamentally, the speech for which payment is prohibited cannot be deemed the "profits" of crime or the "exploitation" of crime consistent with the First Amendment. Moreover, as the panel below recognized, section 632-a is both substantially underinclusive and overinclusive with respect to ensuring that criminals do not profit from crime.

a. Royalties for books like *Wiseguy* are not the profits of crime.

Payment for the speech subject to section 632-a cannot be considered to be profit from crime under the First Amendment. The notion that all payments of royalties to authors who discuss their crimes constitute "profit" from crime is fundamentally flawed, inconsistent with both traditional understandings and free speech values.

The principle that royalties for a book are a return to the labors of authorship is inherent in the Constitution's scheme of inducing the creation of literary works by "assur[ing] authors" — not their subjects — "the right to [the author's] original expression". *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 59 U.S.L.W. 4251, 4252-53 (U.S. Mar. 27, 1991).[26] "[W]ritings . . . are the fruits of intellectual labor," as the Court recently noted, *id.*, and cannot be considered the fruits of crime except in the most indirect and trivial way.

Neither common law nor statutes have included payments for speech within the general definition of the fruits or proceeds of

26 *See also Stewart v. Abend*, 110 S. Ct. 1750, 1758 (1990) ("renewal term of copyright is the law's second chance to the author and his family to profit from his mental labors"); *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 546 (1985) ("The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors"); *New Era Publications Int'l v. Carol Publishing Group*, 904 F.2d 152 (2d Cir.), *cert. denied*, 111 S. Ct. 297 (1990) (biographer, not assignee of biography subject, entitled to income from biography).

crime subject to restitution or forfeiture.[27] Payment for books subject to section 632-a are no more the "profits" of crime than royalties for presidential memoirs are "emoluments" of office (forbidden under the Constitution, Art. II, § 12, cl.5), or than advances for the memoirs of corporate executives are corporate opportunities. *Wiseguy* is simply not a case, like those applying the principle that no one should profit from crime,[28] where the economic benefit motivates and flows proximately from the illegal act.

No different result obtains by asserting that the speech whose payment section 632-a prohibits is the "exploitation" of crime causing "additional suffering" and offending the public's "sense of decency." Br. in Opp. at 14; *see also* pp. 24-25 *supra*. Neither offensiveness nor the "suffering" that non-defamatory speech can sometimes cause provides a basis on which speech can be regulated. *United States v. Eichman*, 110 S. Ct. 2404; *Texas v. Johnson*, 491 U.S. at 414; *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55-56

27 In New York, as in other jurisdictions, the proceeds or fruits of crime have included only the money, securities, or goods directly obtained in a crime. *See, e.g., People v. Smith*, 537 N.Y.S.2d 65 (2d Dep't 1989); *City of New York v. Cosme*, 413 N.Y.S.2d 20 (1st Dep't 1979); *see also* Goebel & Naughton, *Law Enforcement in Colonial New York*, at 717 (The Commonwealth Fund 1944) (after colony abolished forfeiture of all a felon's goods, orders of restitution were limited to stolen goods and instruments of death). Federal cases are to the same effect. *E.g., Warden v. Hayden*, 387 U.S. 294 (1967) (fruits of crime described as stolen property or property whose possession is a crime).

28 *E.g, Riggs v. Palmer*, 115 N.Y. 506 (1889) (precluding inheritance by beneficiary who committed murder to inherit).

(1988) ("adverse emotional impact" provides no valid basis for burdening speech).

Holding that the prior criminal conduct of an author or primary source transforms payments for speech into profit from crime in any event improperly focuses on the character of a speaker. The proper focus is not on the speaker but on "whether [the law] abridges expression that the First Amendment was meant to protect." *First Nat'l Bank*, 435 U.S. at 776; *id.* at 776-78, 781-83; *see also Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 765 (1976) (right to receive information); *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965) (same); *cf. Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . ."). Since *Wiseguy* is fully protected speech, the First Amendment forbids a prohibition on the payments without which it could not have been written, regardless of the Board's assessment of Henry Hill's prior conduct.

A law that would, had it been in effect at the time and place of publication, prohibit payment for works like *The Autobiography of Malcolm X*, *Where Do We Go From Here* by Martin Luther King Jr., *Narrative of the Life of Frederick Douglass, An American Slave: Written by Himself*, *Manchild in the Promised Land* by Claude Browne, *Every Secret Thing* by Patty Hearst, *Soul on Ice* by Eldridge Cleaver, *Borstal Boy* by Brendan Behan, *A Thief's Journal* by Jean Genet, *Witness* by Whitaker Chambers, *Lady Sings the Blues* by Billie Holliday, *How I Became a Socialist* by Jack London, *Blind Innocence* by John Dean, *On Civil Disobedience* by Henry David Thoreau, and *Wiseguy* itself, has the impermissible

effect of depriving the public of speech "that the First Amendment was meant to protect."[29]

b. Section 632-a is not narrowly tailored to prevent criminals from profiting from crime.

Even assuming *arguendo* that payments for speech could ever be considered the profits of crime, section 632-a is substantially

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29 The body of published writings that would have been subject to the Son of Sam law had it been in effect at the time and place of publication, ranging from narratives by fugitive slaves to writings by prisoners and ex-prisoners, is enormous. A list of hundreds of such works written by convicted and incarcerated criminal authors in America during the years 1789 to 1988, and discussing their importance, may be found in Franklin, *Prison Literature in America* at 291-341 (Oxford University Press, Expanded Edition, 1989).

Franklin writes that at times the "spectacle" of incarcerated criminals "actually publishing books which were being received as literary achievements or intelligent social analysis" was seen by society as "fundamentally threatening." This led to "suppression" of such works in the 1930s, for example at San Quentin, where "'cells were searched . . . not for narcotics or knives, but for manuscripts,' and all those found were removed and presumably destroyed." Franklin, *supra*, at 161-62, quoting from deFord, "Shall Convicts Write Books?" *Nation* 131 (Nov. 5, 1930) at 496. The Son of Sam law is merely a recent and more sophisticated instance of "suppression" of such disfavored books.

Among the leading writers who have been incarcerated for crime, and whose autobiographies if written would thus be subject to a Son of Sam-type law, are Villon, Thomas More, Cervantes, Walter Raleigh, John Donne, Richard Lovelace, Daniel Defoe, Voltaire, Diderot, Thoreau, Melville, Oscar Wilde, Jack London, O'Henry, Robert Lowell, and Bertrand Russell. *See Franklin*, *supra* at 233.

underinclusive with respect to the interest in assuring that criminals not profit from crime.

First, that the law provides for the payment of the escrow fund to the criminal if no claims are made within five years makes plain that preventing criminals from profiting from crime is not truly the interest underlying this statute. Indeed, subject to the five year waiting period, the law allows *all* criminals whose assets are adequate to compensate their victims to "profit" by writing about their crimes. The law also allows all those who commit victimless crimes eventually to profit through writing about them.

"[A] law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interests unprohibited." *The Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989) (citation omitted); *see also Carey*, 447 U.S. at 465 & n.9; *First Nat'l Bank*, 435 U.S. at 793. The majority below recognized that the crime-should-not-pay rationale could not justify section 632-a for this same reason: "[e]ven under the statute, criminals may receive payments . . . if no victims come forward with claims or if funds remain after all claims are paid." 13a.

Nor does the crime-should-not-pay maxim explain why the legislature did not provide for the attachment of all the other payments by which criminals (including the unconvicted and immunized, like Henry Hill) "profit" from crime. The payments made to Willie Sutton, the career bank robber who was engaged as a bank security consultant after many years in prison, or to reformed drug addicts who become drug rehabilitation counselors at centers like Daytop and Phoenix House, or to those who use

their prior life of crime as a springboard to an evangelical career,[30] or to a reformed burglar using his expertise as a locksmith,[31] or even to those who are immunized and enter the witness protection program or are engaged as confidential informants, are illustrative of the myriad different ways in which criminals "profit" in ways dependent on their criminal experiences, none of which New York has seen fit to reach.

Nor does the crime-should-not-pay rationale explain why the law fails to reach payments for books in which a criminal author fictionalizes his experience, such as Herman Melville's novels *Omoo* and *Typee* (drawing on Melville's experiences as a mutineer and deserter) or some of Jack London's works. New York also allows those who become notorious through crime (Bernhard Goetz, Tawana Brawley, and Jack Henry Abbott, for example) to capitalize on their fame through television interviews, books on subjects other than their crimes, and in other ways so long as they do not write or speak about their crimes. Abbott's book on prison conditions no doubt had its sales increased in consequence of the public notoriety of his murder of Richard Adan, yet the law did not aid Adan's heirs.

In short, the asserted interest does not explain the law's content-based underinclusiveness, and therefore cannot rescue it.

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30 For example, Watergate felon Charles Colson, or Freddie Gage, who enhanced his credibility and earned his living as a born-again preacher by pointing to his triumph over early criminal experience, which he subsequently wrote about in *Pulpit in the Shadows* (1966).

31 *See New York Times*, January 4, 1990, C2, col. 4, for a story about "safecrackers" who make their living opening malfunctioning safes and the safes of the deceased and those who have forgotten their combinations.

Arkansas Writers' Project, 481 U.S. at 231-33 (asserted state interests failed to explain content-based regulation); *Minneapolis Star*, 460 U.S. at 586 (interest in taxation "cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available); *Carey*, 447 U.S. at 465 (underinclusiveness of statutory restriction "would seem largely to undermine appellant's claim that the prohibition of all non-labor picketing can be justified by reference to the State's interest in maintaining domestic tranquility"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975) ("Appellee offers no justification, nor are we aware of any, for distinguishing movies containing nudity from all other movies in a regulation designed to protect traffic").

Section 632-a is also substantially overinclusive with respect to the not-profiting-from-crime interest, again assuming that speech can ever be considered the profit from crime. Publishers cannot make any part of the payment to an accused or convicted person for any work mentioning the crime, no matter how slight the mention or how unimportant in the context of an entire book. *See Children of Bedford, Inc. v. Petromelis*, *supra* (upholding application and constitutionality of Son of Sam law).

Thus, for example, Malcolm X was already famous as a Black Muslim political leader when he wrote his compelling *Autobiography*, and the royalties due Malcolm X were in no sense the profits of crime. Yet the Son of Sam law, had it been in effect at the time and place of publication, would have prohibited him from receiving for five years any of the compensation due him for the work because it also discusses his early life of crime. So too with *Where Do We Go From Here?*, which describes Martin Luther King Jr.'s arrest in Birmingham, or works like *Somebody Up There Likes Me*, by Rocky Graziano.

The statute's application to works principally on subjects other than their authors' crimes goes far beyond any circumstances in which the state's legitimate interest may be implicated and necessarily results in gratuitous deterrence of protected speech. For example, interest would be high in an autobiography by Bess Myerson, a former Miss America who gained high public office; the royalties she would earn are hardly the fruits of crime. Yet she would be deterred in an autobiography from explaining why she shoplifted $40 worth of cosmetics[32] had that crime occurred in New York.

3. Section 632-a's Distinctions Are Neither Necessary Nor Narrowly Tailored to Prevent Criminals From Exploiting or Profiting From Their Crimes While Their Victims Remain Uncompensated

Recognizing that neither victim compensation nor the interest in assuring that criminals not profit from crime can save section 632-a from condemnation under strict scrutiny, both the Court of Appeals and the Board reformulated the state's interest by mixing the two together. In the words of the Court of Appeals, the Son of Sam law is justified because "[o]ur society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for the financial loss occasioned by the crime." 13a-14a. But our society also "deems it fundamentally unfair" if a criminal enjoys the fruits of an ordinary inheritance, or of a book about a subject other than the crime, or a stock portfolio, or any other asset, "while the victim remains uncompensated." This justification fails because

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32 *See The New York Times*, September 13, 1988, B1, col. 4.

New York cannot explain why it remedies this unfairness only in cases of certain speech.

Moreover, as Judge Newman correctly observed (20-21a), by describing the state's interest in terms that precisely mirror what the statute does (attaching for the benefit of the crime victim only payments for certain expression until the victim is compensated), the majority used word play to side-step its obligation to find a compelling justification for the content and speaker-based distinctions and press-targeting that is presumptively invalid under this Court's decisions.

The circular approach of the decision below results in Rube Goldberg-like formulations of state interest that render strict scrutiny toothless. Just as Illinois' statute barring only non-labor picketing outside private homes could not be justified as narrowly tailored to keep non-labor picketing from disturbing tranquility (why should Illinois not protect tranquility against all picketing?), *Carey*, 447 U.S. at 465, so too, New York's Son of Sam law may not properly be justified as "narrowly tailored to the State's interest in denying criminals any gain from the stories of their crimes until the victims of those crimes are fully compensated for all losses arising out of their victimization." 15a. Why should New York not assure that, until their victims are compensated, criminals will be denied the enjoyment of all assets, not just payments by publishers for certain instances of the exercise of free speech rights?

This asserted interest also incorrectly assumes that all works mentioning a crime involve payments for nothing except the "recounting" or "exploiting" of that crime. A moment's consideration of the works named above on p. 36 — all valuable contributions to society achieved through authorial effort and creativity — shows that any royalties involved are hardly payments for the crimes.

Finally, this interest supposedly served by the law cannot explain why the law applies to victimless crimes or to criminals whose assets are in any event adequate to compensate their victims (as, for example, Bess Myerson's would seem to be, *see* p. 41, *supra*).

The Court of Appeals also sought to excuse the statute's focus on speech only of specified subject matter with the assertion that "as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes." 15a. This is sheer speculation, and does not amount to compelling necessity for singling out speech when generally applicable regulation would serve as well without raising any censorial threat. *See Meyer*, 486 U.S. at 426 (invalidation where "no evidence [was] offered" to support "speculation"); *Arkansas Writers' Project*, 481 U.S. at 231-33; *Carey*, 447 U.S. at 464-69.

Moreover, the legislature did not find, the state has never argued, and there is little reason to believe that the sole asset of most criminals — especially those likely to obtain book contracts — is the opportunity to tell their stories, as the dissent observed. 21a. For the vast majority of criminals, the opportunity to tell their stories is no asset at all. And the criminals able to sell their stories are those most likely to have the skills enabling them to acquire other assets as well.

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In sum, a crime victim's need for compensation extends to all the tortfeasor's assets, not just those arising from speech, and society's interest in justice and retribution is simply not implicated by the books singled out and deterred by section 632-a, certainly not in any way different from many other assets and sources of income that section 632-a leaves unregulated. If New York deems

its existing remedies inadequate in some respects to ensure that crime victims' tort judgments will be satisfied, the First Amendment compels New York to improve those measures without singling out (certain) speech for special adverse treatment.

CONCLUSION

The judgment below should be reversed, and the case remanded for entry of a declaration that section 632-a is unconstitutional, an injunction enjoining its enforcement, and an order awarding petitioner costs and attorneys' fees pursuant to 42 U.S.C. § 1988.

Respectfully submitted,

RONALD S. RAUCHBERG,
Counsel of Record
CHARLES S. SIMS
PROSKAUER ROSE GOETZ
& MENDELSOHN
1585 Broadway
New York, New York 10036

MARK C. MORRIL
SIMON & SCHUSTER, INC.
1230 Avenue of the Americas
New York, New York 10020

Counsel for Petitioner

April 19, 1991